Supreme Court, U.S.
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No. 96-

In The
Supreme Court of the United States
October Term, 1996

VINCENT V. ROGGIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit correctly held that issues which are both structural and jurisdictional, timely raised at trial and in the petitioner's initial §2255 motion, are barred under the successive motions doctrine when the trial judge explicitly declined to address the issues on the merits in the initial petition and the issues have never been addressed by any court post-trial?

2. Whether the petitioner was simultaneously denied his Sixth Amendment rights to counsel and a public trial when, in response to a detailed pre-trial letter complaining of ineffective assistance, the trial judge held an unannounced, unrecorded meeting in chambers with court appointed counsel, the subject of the letter, and the prosecutors without the petitioner's knowledge or presence and subsequently announced in open court, without any inquiries on the record, that counsel was prepared?

3. Did the Eleventh Circuit err in declining to address on the merits the indictment's charging of two inherently contradictory theories in each count, one legally sufficient and one legally insufficient, violating the petitioner's Fifth Amendment grand jury right and in the process completely removing the government's burden of proof, for a finding of true on either theory required a finding of false on the remaining theory?

4. Did the Eleventh Circuit err in declining to address on the merits a defense-submitted instruction requiring the government to prove an essential fact charged in each count of the indictment, which was rejected and altered by the trial judge to conform to the government's legally insufficient theory of law, denying the petitioner the right to present a defense and

shifting the burden to the petitioner to prove a fact impossible to achieve to gain acquittal?

5. Did the Eleventh Circuit err and is it reversible error per se in declining to address on the merits a jury instruction which constructively amended the indictment broadening its charges from two identified banks and loans to 30 unidentified banks and 100 unidentified loans based on a legally insufficient theory of law and jurisdiction, and the jury instructions in their entirety did not identify a single date, bank, victim, mailing, loan, or transaction?

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Petitioner, Vincent V. Roggio, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is unreported and appears at App. A, 1a-2a. The Memorandum Opinion and Findings of Fact and Conclusions of Law of the District Court in the initial petition appears at App. A, 3a-7a. The Magistrate's Report and Recommendation in the second petition adopted by the District Judge appears at App. A, 8a-17a. The Magistrate's Report and Recommendation in the third petition adopted by the District Judge appears at App. A, 18a-21a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on January 21, 1997. App. A, 1a-2a. A timely Petition for Rehearing was denied on March 20, 1997. App. C, 33a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Fifth and Sixth Amendments to the Constitution of the United States. The Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with all witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was charged on August 7, 1984 in a six-count indictment. App. B, 22a-30a. Counts 1, 2, and 3 charged mail fraud in violation of Title 18 United States Code §1341. Counts 4, 5, and 6 charged causing materially false statements to be made to federally insured banks in violation of Title 18 United States Code §1014. On October 3, 1985 petitioner was indicted again in a single-count indictment which charged causing materially false statements to be made to a federally insured savings and loan association, in violation of Title 18 United States Code §1014. App. B, 31a-32a. The government did not charge nor has it ever claimed that the petitioner personally received financial remuneration from any of the loans. The two cases were tried in consolidation.

The gravamen of the charges contained in the indictment, charged ten times in the first four counts, is based on the government's novel theory of "after-acquired debt." This theory requires a borrower to report liabilities incurred after the specified date of a financial balance sheet and without any request from a bank. At trial, the petitioner argued vigorously that these charges were not in violation of the law. Despite the indictment's identification of just three banks and three alleged false statements, the trial lasted 10½ weeks.

The petitioner requested a jury instruction to stave off this misplaced theory of law. It was denied based on the government's claim that debt not reported on a financial balance sheet after the date it was made could be construed as a material omission. RT344,4125. The petitioner then submitted a proposed jury instruction requiring the government to prove as required under Title 18 U.S.C. §1014 and §1341 that the petitioner's statements were false when made as charged in each count of the petitioner's two indictments. RT192,3. The trial judge rejected this instruction upon the urging of the government

that, to be accurate, the instruction should include true statements that "become false." RT341,5570-71.

The petitioner was convicted on all counts. Prior to sentencing, petitioner filed several post-trial pleadings for relief including new trial, judgment of acquittal, and dismissal of the indictment. RT220;221;222;223. All motions were denied. Petitioner, a first-time offender, was sentenced to twelve years in prison under the old law, served the maximum two-thirds, and is currently serving five years of probation.

On direct appeal, petitioner raised *inter alia* ineffective assistance of counsel and his right to be present at a critical stage of the proceedings. He also raised, under insufficiency of the evidence, that failure to report liabilities after the date of the statement did not constitute a violation of law and that the government's theory at trial had amended the indictment. The Eleventh Circuit affirmed without addressing any of these issues but for ineffective assistance of counsel. *See, United States v. Roggio,* 863 F. 2d 41 (11th Cir. 1989), *cert. denied,* 490 U.S. 1109, *U.S. reh. denied,* 492 U.S. 933 (1989).

Petitioner then moved in the district court for relief from the convictions in both cases pursuant to Title 28 U.S.C. §2255, RT363, together with ancillary pleadings, *e.g.,* RT365; 367;372;375;376;377. Relief was denied concerning Issues 1 through 10 on the exclusive basis that these issues had been decided on direct appeal, though not addressed in the panel's opinion. App. A, 3a-4a. The issues raised in the initial petition are listed in the Magistrate's Report. App. A, 10a-12a. Petitioner timely appealed to the Eleventh Circuit which summarily affirmed on July 2, 1991 *See, United States v. Vincent Victor Roggio,* Case 90-5247; 90-5412 (11th Cir. 1991) unpublished. In June 1991, petitioner filed a Petition for Writ of Habeas Corpus pursuant to Title 28 U.S.C. §2241 in the Western District of Tennessee. It was construed as a §2255 motion,

transferred to the court in the Southern District of Florida, and denied as a successive petition. App. A, 13a-15a. In August and September of 1993, petitioner filed the instant cases. On January 23, 1996, they were denied by the district court once again as successive petitions, adopting the Magistrate's Report and Recommendation. App. A, 15a.

REASONS FOR GRANTING THE WRIT

The court of appeals decision in this case has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such departure by a lower court that it calls for an exercise of the Supreme Court's power of supervision. The court of appeals decision in this case raises the fundamental question of whether the abuse of the writ and successive petition doctrine can ever be applied to structural defects in the constitution of the trial mechanism, to constructive amendments of the indictment through a broadening of its charges, to charges contained in both the indictment and jury instructions which failed to constitute an offense, and to charges which removed the government's burden of proving essential elements charged in the indictment. Also, the Eleventh Circuit's opinion conflicts with numerous applicable decisions of the Supreme Court.

Specifically, the court of appeals decided the petitioner's ineffective assistance of counsel claim and due process right to be present at a critical stage of the proceedings on direct appeal without any record from the district court. In doing so, the court of appeals sanctioned the district court's determination of court appointed counsel's preparation in an unrecorded meeting in chambers without the petitioner's knowledge or presence. The court of appeals subsequently sanctioned the district court's refusal to address the first ten issues contained in the petitioner's initial motion pursuant to §2255 on the merits. Finally, the court of appeals sanctioned the denial of subsequent petitions, raising the same issues, as successive petitions.

The lower court's decisions contravene numerous applicable decisions made by the Court: *Stirone v. United States,* 361 U.S. 212, 217 (1960); *In re Winship,* 397 U.S. 358, 364 (1970); *Sullivan v. Louisiana,* 508 U.S. 275 (1993); *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991) ; *United States v. Olano,* 507 U.S. 725, 736 (1993); *Carella v. California,* 491 U.S. 263, 269 (1989); *Griffin v. United States,* 502 U.S. 46, 59 (1991); *Williams v. United States,* 458 U.S. 279 (1982).

For over a decade the petitioner has argued denial of counsel, denial of due process, tried on conduct that fails to constitute an offense, and tried on charges not contained in the indictments. The lower courts' complete silence requires the Court's supervisory power.

THE PETITIONER'S CLAIMS ARE NOT BARRED UNDER THE SUCCESSIVE AND ABUSIVE MOTIONS DOCTRINE

The Eleventh Circuit's Opinion (App. A, 1a-3a) stands for the untenable proposition that an issue raised in the petitioner's pre-trial letter (being tried on charges not contained in the indictment concerning banks outside the jurisdiction of the district court) and being tried on charges that fail to constitute an offense (argued vigorously at trial and denied), are subject to procedural bars when raised again in a petitioner's initial §2255 petition.

Under the appeals court's decision, any constitutional or jurisdictional error raised at trial, decided wrongly, then raised on direct appeal yet never addressed in the panel's opinion, cannot be raised in an initial motion pursuant to §2255. The argument would further follow that constitutional and jurisdictional errors raised again in a subsequent petition can be denied on the basis of the successive petition doctrine though the trial judge explicitly declines to address the issues on the merits in the initial petition. These procedures ignore the Rule of

Sanders v. United States, 373 U.S. 1, 16 (1963) that the successive petition doctrine cannot be applied to issues raised in the initial petition which were never decided on the merits.

Indeed, even those commentators who have advocated imposing significant restrictions on collateral review have not challenged the traditional scope of habeas corpus to challenge the district court's jurisdiction even when there is a guilty plea. *See,* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142, 151-52 (1970); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 460-62 (1963); *also see, United States v. Harper,* 901 F. 2d. 471, 473-74 (5th Cir. 1990) (§2255 case upon plea of guilty where no direct appeal was taken) ("Failure to charge an offense may be raised for the first time in a §2255 petition because such an error divests the sentencing court of jurisdiction.")

In his initial petition, proceeding pro se, the petitioner raised *inter alia:* Issue 8, "The trial court lacked venue and jurisdiction to try the case in the Southern District of Florida;" Issue 9, "The movant was indicted and convicted on a theory of criminality which has no foundation in law and fact;" Issue 11, "The movant was denied his Sixth Amendment right to counsel and his right to be present at a critical stage of the proceedings;" Issue 13, "The movant was denied his theory of defense instruction." App. A, 11a-12a.

The trial judge denied the above issues without addressing them on their merits (App. A, 3a-4a) and the court of appeals summarily affirmed without opinion. *United States v. Vincent Victor Roggio,* Case No. 90-5247; 90-5412 (11th Cir. July 2, 1991) (unpublished). The above procedure by the district court and the court of appeals effectively suspended the petitioner's right to file a motion pursuant to Title 28 U.S.C. §2255.

The Court has never held implicitly or explicitly that the successive petition and abuse of the writ doctrine can be applied to issues raised on direct appeal which were never addressed on the merits. Furthermore, constitutional issues which deprive the district court of jurisdiction are not procedurally barred. *See, e.g. Chambers v. United States,* 22 F.3d. 939, 943 (9th Cir. 1992) (whatever the scope of the cause and prejudice requirement, it clearly does not bar review when a defendant raises a jurisdictional claim). *Also, see,* Fed. R. Crim. P. Rule 12(b)(2) (lack of jurisdiction can be raised at any time).

In the instant case, the Magistrate Judge's Report and Recommendation, adopted by the district judge, denied the petitioner's jurisdictional claims in his second petition as successive based on the cause and prejudice standard of *McCleskey v. Zant,* 499 U.S. 467, 493-494 (1991). The Magistrate Judge wrote, "The movant has not alleged any *cause* for his failure to advance the argument that the sentencing court lacked jurisdiction." (Emphasis added.) App. A, 15a.

Most important, the appeals court declined to address the petitioner's contention that the constitutional and jurisdictional errors in this case satisfy the fundamental miscarriage of justice standard of *McCleskey* applicable to these cases. If the errors in the instant case go uncorrected it would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Olano, supra,* 507 U.S. at 736.

The petitioner repeatedly claimed below that the errors in the instant case, both individually and collectively, were structural and deprived the petitioner of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark,* 478 U.S. 570, 577-578 (1986).

PETITIONER WAS SIMULTANEOUSLY DENIED HIS SIXTH AMENDMENT RIGHTS TO COUNSEL AND A PUBLIC TRIAL

On December 3, 1986, 28 months after the petitioner's first indictment was returned (App. B, 22a) and 14 months after the second (App. B, 31a) court appointed counsel, Eugene Zenobi ("Zenobi") attended a pre-trial conference in the instant cases. With the upcoming trial date scheduled for February 2, 1987, not a single substantive motion had yet been filed on behalf of the petitioner. In fact, at the close of this hearing, Zenobi attempted to remove himself from the case:

> MR. ZENOBI: Does this mean I am not being fired?
>
> THE COURT: That's right. Zenobi, you are not getting out of this case, let's put it that way. You may have taken this case under the guise of something else in the back of your head, but you are in.
>
> MR. ZENOBI: This was a favor --
>
> THE COURT: I know, I know.
>
> MR. ZENOBI: -- to the Magistrate. He is up in Maine now, laughing. RT82,4.

On January 12, 1987, the petitioner met Zenobi at his office to discuss for the first time the issues involved in both cases.[1] During their 45-minute meeting, Zenobi advised the petitioner that this was "a simple case"[involving two banks and two loans]. App. E, 45a. Two days later, on January 14, 1987, Zenobi attended the final pre-trial conference. It was here that Zenobi learned for the first time and complained to the trial judge that "the government's position *now* is that they are pretty

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[1] The petitioner had attempted unsuccessfully during the prior 13 months to communicate with Zenobi. App. E, 44a.

much going up and down the Eastern Seaboard in the introduction of the evidence as opposed to just sticking with the two banks in Florida." App. D, 34a. Zenobi continued, "I realize we're a little behind schedule . . ." App. D, 35a. The government, at this hearing, characterized the documents in their possession which Zenobi had yet to see as requiring a truck to move and being a room unto themselves. App. D, 36a. Due to distance and expense the petitioner was unable to attend these two pre-trial conferences.

Despite Zenobi's enlightened discovery, he made no attempt to communicate this to the petitioner. On January 27, 1987, one week before the scheduled trial date, the petitioner telephoned Zenobi and was told for the first time that the government would introduce evidence from other jurisdictions. Zenobi commented that "the law stinks." App. E, 46a. Recognizing that the petitioner was upset by this eleventh hour revelation, Zenobi advised the petitioner to write the trial judge a letter, which the petitioner did. App. E, 46a.

Having received no response from the trial judge and having had no further communication with Zenobi, the petitioner traveled to Miami on February 9, 1987 for his first day of trial. Upon arrival, the petitioner found an empty courtroom. Approximately 20 minutes later, the trial judge, the prosecutors, and Zenobi emerged from chambers. After inquiring whether the petitioner was present, the trial judge acknowledged receipt of the pre-trial letter, read its final paragraph into the record, and concluded that Zenobi was prepared. App. D, 37a-38a.

The trial judge stated that Zenobi's preparation was "more than adequate" and "very frankly, is not the criteria required under the Eleventh Circuit." and that he was "going to set the matter to rest at this point." App. D, 38a-39a.

Recognizing that the trial judge had decided the substantial complaints contained in his pre-trial letter outside the courtroom

and without his knowledge or participation, the petitioner asked, "Am I permitted to defend myself, your Honor?" App. D, 39a. Without waiving his Sixth Amendment right to counsel, the petitioner proceeded pro se during the 10½ week trial.

The right to a public trial does not turn on whether the inquiry of a hearing is factual or doctrinal, substantive or procedural, but on the relationship of the issue raised at the hearing to the merits of the charge, the outcome of the prosecution, and the integrity of the administration of justice. *See, Gannett Co. v. DePasquale,* 443 U.S. 368, 433037 (1979). The right to a public trial is not limited to issues that arise after a jury is sworn or times when the jury is present. It extends at least to those pre-trial hearings that are an integral part of the trial, such as jury selection and motions to suppress evidence. *See, United States v. Chagra,* 701 F. 2d 354 (5th Cir. 1983). "Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *See, Richmond Newspapers Inc. v. Virginia,* 448 U.S. 55, 579 (1980). A public trial is both primary and instrumental: not merely a method to assure that nothing untoward is done clandestinely, but a guarantee against the very conduct of private hearings. It is "a check on judicial conduct and tends to improve the performance both of the parties and of the judiciary." *Chagra,* 701 F.2. at 363.

Here, the trial judge decided the petitioner's substantial complaints contained in his pre-trial letter in an unrecorded meeting in chambers. All of the complaints contained in the petitioner's pre-trial letter were outside the scope of the trial judge's knowledge. The trial judge's finding on the first day of trial that Zenobi "has been over" the records is completely contradicted by the pre-trial conference two weeks earlier. App. D, 34a.

Given the petitioner's knowledge of Zenobi's refusal to communicate with him for over one year, Zenobi's contradictory advice as to the law as applied to these two cases, and Zenobi's failure to review any of the tens of thousands of defense documents located in Washington, DC (App. E, 44a-45a) or those in the government's possession (which remains uncontroverted) and his unwillingness to devote any more than the 45 minutes with the petitioner to prepare for a 10 ½ week trial (App. E, 44a-45a.) the trial judge's actions denied the petitioner his Sixth Amendment right to a public trial. With the indictment's infirmities never being tested by Zenobi pre-trial, the petitioner was justified in his concerns.

It is not surprising that the petitioner on the first day of trial assumed that there was something untoward with the process by which his substantial complaints of court appointed counsel's preparation were being handled by the trial judge. These well-founded concerns directly led to the petitioner's question of whether he was permitted to defend himself. The petitioner's Sixth Amendment right to a public trial undeniably includes the right to have counsel's preparation decided in open court so that the public, and in this case the petitioner, are assured that the procedures employed are fair and accurate. The trial judge's procedure also infringed upon the petitioner's right to be present at a critical stage of the proceedings.

Furthermore, the meeting in chambers completely denied the petitioner's Sixth Amendment right to counsel. Surely Zenobi was not representing the petitioner in chambers, for he was the subject of the petitioner's complaint. Once Zenobi told the petitioner to write a letter to the trial judge because of the petitioner's dissatisfaction with his pre-trial preparation (App. E, 46a) the petitioner and Zenobi entered into adversarial positions. Without exception, the Court has held that the total deprivation of the right to counsel, at a critical stage of the proceedings, requires reversal. *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The petitioner has repeatedly filed motions for an evidentiary hearing in an effort to discover what transpired in chambers on the first day of trial (e.g., RT297;365;381;432). All of these motions were summarily denied. On direct appeal, the petitioner filed a motion for limited remand for the sole purpose of determining what facts the trial judge relied upon in chambers to conclude that Zenobi was prepared. The government opposed the limited remand and it was denied by the Eleventh Circuit.

On direct appeal, the petitioner raised the issue of the unrecorded meeting in chambers as his due process right to be present at a critical stage of the proceedings. The issue was never addressed by the panel. *Roggio,* 863 F. 2d 41. However, on direct appeal the panel did decide the petitioner's ineffective assistance of counsel claim despite the law of that Circuit which prohibits such claims on direct appeal without a record. *United States v. Griffin,* 699 F. 2d 1102 f.n. 14 (11th Cir. 1983). *Griffin* is in accord with the position of the Solicitor General, *Chappell v. United States,* (No. 89-1040) and nine other circuit courts of appeal. Brief for the United States in Opposition (collecting cases).

In denying the petitioner's claim of ineffective assistance of counsel on direct appeal, the court wrote "we see no evidence in the record to indicate that the district judge was incorrect and therefore we find that Roggio's claim of ineffective assistance of counsel must fail." *Roggio,* 863 F. 2d at 42. How the Eleventh Circuit denied the petitioner's ineffective assistance of counsel claim and due process claim to be present at a critical stage, without a record, remains a mystery. The only record, other than conclusionary statements made by the trial judge, completely supported petitioner's claims.

THE TWO CONTRAVENING THEORIES CONTAINED IN COUNTS ONE THROUGH FOUR MANDATED A GUILTY VERDICT

The six-count indictment, App. B, 22a, in the first four counts charged two inherently contradictory theories which precluded acquittal. Count 1, para. 5 ABCDE&F (App. B, 24a-25a) and incorporated by reference as if set forth at length in Counts 2 and 3, charged that the petitioner was guilty of submitting financial statements that were false and misleading on their specific dates. Count 1, para. 6A & B (App. B, 25a) also incorporated in Counts 2 and 3, charged that the petitioner was guilty of submitting the same financial statements charged in Count 1 ABCDE&F without reporting $10 million in liabilities incurred between the date of the statement and the date credit was requested. Count 4 (App. B, 28a) charged that the petitioner failed to disclose on his December 31, 1981 personal financial statement $10 million in liabilities incurred between December 31, 1981 and October 5, 1982.

The charges in these four counts supported the proposition that guilt could be established if the financial statements reflected only the assets and liabilities of a *specific date and* if these statements failed to reflect liabilities of a *subsequent date.* There can be no defense to these directly contradictory charges. (Emphasis added.)

The government described their two theories charged in the indictment in their opening argument:

FIRST THEORY

> MS. HECK: Ladies and gentlemen, you will be learning that a personal financial statement is a portrait in time, fixed as a particular moment . . . [it] is essentially a picture frozen in time of a particular individual's financial status. It exists as of a given

> date, and it states as of that date what were the *assets* and liabilities of that person yielding ultimately a net worth figure for that person. RT308-13.
>
> **SECOND THEORY**
>
> MS. HECK: But you'll learn that there was a second way in which Mr. Roggio *used personal financial statements* in such a fashion as to mislead the banks, and that is you will learn that between the date of that *personal financial statement* and the time that the bank was contemplating making that loan during what I call the *window of time* or the *time lag,* that there were substantial new liabilities incurred by Mr. Roggio which were not revealed to the bank contemplating lending money to him . . . one of the ways in which the *personal financial statements were wrong or misleading was that they did not reflect all of the debt that Mr. Roggio was incurring* . . . we will be proving to you other *debt that Mr. Roggio was incurring* which wasn't necessarily fully reflected on those *personal financial statements.* (Emphasis added.) RT308-14-16.[2]

The government's so-called "time lag" or "window of time" is in itself contradictory to its alternative charge. A "snapshot in time" is a fixed portrait; a "time lag" is vague and subjective. In accepting the government's "time lag" theory (that a financial statement must reflect liabilities incurred after the date of the statement) one must then reject its "snapshot in time" theory (that

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[2] The petitioner attempted to elicit testimony from Early Lyman Gilbert ("Gilbert"), a government witness and a certified public accountant, that the government's second theory was not based on any accounting principles. The government's objections were sustained by the trial judge. RT336, 4570-71. Gilbert subsequently testified that the financial statement was correct as of its specific date. RT350, 4433.

a financial statement reflects assets and liabilities of a given date).

To put the government's after-acquired debt theory in the proper perspective, it is important to point out that the government devoted nearly six weeks of its 7½ week case-in-chief submitting that the petitioner failed to report after-acquired liabilities secured from a score of uncharged banks and loans.

The first three counts of the six count indictment charged a mail fraud scheme beginning in May 1981 and concluding in December 1983. App. B, 23a. The charges do not identify any conduct by the petitioner for the first 16 months of the alleged scheme. The first identified act appears at September 1, 1982 when the petitioner applied to Barnett Bank for a $500,000.00 line of credit. App. B, 28a. The last identified act appears at January 1983, when the petitioner applied for a $500,000.00 loan from Pan American Bank. App. B, 30a. Thus, the indictment fails to identify any conduct for the first 16 or the last 12 months of the scheme charged.

The government's second theory explains the genesis upon which the last part of the scheme, from December 31, 1981 to December 1983, was created (i.e., petitioner failed to report liabilities incurred after the December 31, 1981 on that statement). However, the indictment on its face does not indicate what triggered the May 1981 date as the start of the scheme charged in the indictment. The answer is found in an exchange mid-trial between the trial judge and the prosecutor, which led to the government's third theory:

> THE COURT: The debt that he was accruing? What is the obligation -- what is the obligation of a borrower to, in fact, go back to a bank that he has already borrowed money from and owes and say, hey, and by the way, I borrowed a hundred thousand dollars more last week? There is nothing in the law that requires that.

> MS. HECK: Your Honor. I think that you really overlook the whole notion of material omissions. If, in fact, at a time when Mr. Roggio --
>
> THE COURT: Omissions occurred when he got the loan.
>
> MS. HECK: But that is not when the fraud is complete, Your Honor. The fraud continues through the time the banks are being deceived.
>
> THE COURT: What bank? Barnett? Pan American?
>
> MS. HECK: What I call the victim banks, yes, sir.
>
> THE COURT: Let me understand what your position is. Are you suggesting that the law requires a borrower to, in fact, continually update and bring to the attention of a bank that doesn't even ask for it?
>
> MS. HECK: If it is part of a scheme to defraud.
>
> RT327,2833-34

Under the charges in the first three counts, the petitioner could be convicted for failing to report liabilities after the date of the statement and for failing to report new loans to old banks. How the petitioner was to report liabilities incurred after the date of the financial statement has not and cannot be explained. Specifically, Count 1, paragraph 6a, incorporated into Counts 2 and 3 (App. B, 25a) in relevant part charged that the petitioner did not include $800,000.00 borrowed from Pan American Bank in *June 1982* on his *December 31, 1981* financial statement submitted to Barnett Bank. Count 1, paragraph 6b (App. B, 25a) in relevant part charged that petitioner failed to include the $500,000.00 liability in *October 1982* and *December 1982* on the petitioner's *June 30, 1982* financial statement presented to Pan American Bank.

It is impossible for the Court to determine based on a reading of the indictment whether all 12 grand jurors returned the indictment based on legally insufficient theories of law or returned the indictment by finding the petitioner's statements true as of the date of the statement but nevertheless false for failure to report liabilities subsequent to that date. The only specific charges of a specific date indicated in the first three counts do not denote how or why these statements were allegedly false. App. B, 24a-25a, A, B, C, D, E, and F.

In this respect, the instant case is easily distinguishable from *United States v. Miller,* 471 U.S. 130, 134 (1985) where the Court found that two theories in a single count did not prejudice the petitioner. In *Miller,* the two theories were based on two separate sets of facts, each individually supported by the charges contained in the indictment. Here, three theories were directed to a single set of facts with two of the theories being inherently contradictory and only one of the three being legally sufficient. The prejudice here is immeasurable. Fed. R. Crim. P. Rule 7(c) states that an indictment shall be a *plain, concise* and *definite* written statement of the essential facts constituting the offense charged. (Emphasis added.) The charges here in the first four counts obliterate the intended purpose of this rule and the petitioner's Fifth Amendment grand jury right.

Finally, it is fundamental that a false statement is a factual assertion which must be able to be characterized as true or false. *Williams v. United States,* 458 U.S. 279, 284 (1982).[3] It is also fundamental that pretenses, representations, and promises, by

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[3] Although *Williams* involved 18 U.S.C. §1014, which makes it a crime to knowingly make a false statement to a financial institution, its reasoning has been extended to the mail, wire, bank fraud and other statutes. *See United States v. Bonnett,* 877 F. 2d at 1454-57; *United States v. Kucik,* 844 F. 2d 493, 498-500 (7th Cir. 1988); *United States v. Rafsky,* 803 F. 2d at 108; *United States v. Frankel,* 721 F. 2d at 919.

definition, require an affirmative act. *Also see, United States v. Woodward,* 469 U.S. 105, 109 (1985) ("§1001 requires affirmative act") quoting *United States v. London,* 550 F. 2d 206, 213 (5th Cir. 1977).[4]

The conduct charged for the first 16 and the remaining 12 months of the scheme, even if true, would not violate the statute. The two legally insufficient theories charged and argued by the government spanning these months are devoid of affirmative acts or factual assertions. Over a century ago, the Court stated in *United States v. Wiltberger,* 5 Wheat.76, 95-96:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

These charges did not just dramatically expand the boundaries of conduct prohibited by the statute; they led the trial judge and the prosecutors into uncharted waters.

> THE COURT: This is going to be a contention of this--this is part of the scheme and device to defraud?

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[4] It is noteworthy that the indictment does not charge any verbal misrepresentations and the only factual assertions contained in all six counts concern the December 31, 1981 financial statement provided to Barnett Bank in September 1982 for a $500,000.00 line of credit and the June 30, 1982 financial statement provided to Pan American Bank in January 1983 for a $500,000.00 loan. No written applications were made for any loans. The only documents submitted were the financial balance sheets. Without exception, every banker testifying on behalf of the government stated that a financial statement was current if it predated the credit by one year.

> MS. HECK: Your Honor, part of the allegations in the indictment is that, from the time period after the date of the personal financial statement, say December 31, 1981 until the time when a loan is consummated, say October 14th, '82, which is the time that a loan was consummated at another bank in reliance on that personal financial statement, that in that interim, there were *additional borrowings that are not disclosed on the personal financial statement.* (Emphasis added.) RT327-2663

The trial judge ruled that the conduct was a misrepresentation by omission:

> THE COURT: The Court did not intend to intimate, in its remarks, that if in fact an individual appeared at a bank to make a loan some nine months after the date of the financial statement, and had in fact incurred substantial liability which would have materially altered or changed the action of the bank because of the fact that the same constituted, in effect, misrepresentation by omissions from the liability section of the financial statement, that in fact that wouldn't be pertinent to be considered by the jury from the standpoint of a scheme to defraud. RT334-4125

The difficulties with the trial judge's holding and the prosecutor's arguments are significant. A financial balance sheet of a specific date as presented to these two banks can only reflect the assets and liabilities of that date in order to "balance" and is incapable of reporting liabilities after that date. The only omission that can occur is when a liability or asset exists as of that date and is not reported on the balance sheet. The financial statements submitted to the banks by the petitioner were all that they purported to be: the assets and liabilities of a specific date

and nothing more. The petitioner vigorously argued this point at trial:

> MR. ROGGIO: But, Your Honor, may I just add one thing here--Mrs. Heck has just said that there--*the indictment is to the point that their subsequent debt to a balance sheet should be shown on that balance sheet.* I really have never seen, heard, and *I would like to see some display of either a legal obligation or even an ethical obligation to do so by someone here.* I've never heard of it. I mean if it's ever--in all these balance sheets, if ever the banks knew of other debts by their own writing that weren't existing on the balance sheet and accepted that, it's just replete in all of this. (Emphasis added.) RT327-2666

The trial judge's and the government's theories transformed the banker's responsibility to request updated statements before providing the credit into a criminal violation for the petitioner. In doing so, they selectively juggled between the generally accepted accounting principle that financial balance sheets of a specific date are indeed a snapshot in time and the "time lag" theory.

The trial judge's holding, as pointed out above, that failure to report after-acquired liabilities on a financial statement of a specific date is a misrepresentation by omission ignores the well-reasoned conclusion that use of a document can only make a factual assertion of those propositions that are necessarily implied by the system of statutes, regulations, and announced policies which created the document. *See, United States v. Waechter,* 771 F. 2d 974, 979 (6th Cir. 1985). A financial balance sheet was created to reflect assets and liabilities of a specific date and can only *omit* that which *exists* on that date. (Emphasis added.)

The petitioner's request for a jury instruction to thwart these theories was denied. RT342,5745-46. The trial judge ruled that the date of the financial statement was not controlling:

> MR. ROGGIO: Okay. In other words, you're saying that in fact, even though a balance sheet, as Ms. Heck said earlier, is a snapshot in time, that there is a law that says you, in fact, what you go to the bank, have to tell them--they're relying on that date, Your Honor, as I understand it.
>
> THE COURT: That's right.
>
> MR. ROGGIO: Okay. The date of the balance sheet.
>
> THE COURT: No. No, no, no, no.
>
> MR. ROGGIO: You don't think they are?
>
> THE COURT: No. I think that that would, very honestly,--be--If you knew that the balance sheet was materially misrepresented--
>
> MR. ROGGIO: When you say "materially," everything is--if you have an--
>
> THE COURT: If you have a $2 million loan you haven't disclosed, in my opinion that's a material misrepresentation. RT343,5748-49.

There can be little doubt that the petitioner was charged with three theories of law in each count, one legally sufficient as a factual assertion (statements false as of the date of the statement) and two legally insufficient (statement false after the date of the statement for failure to report after-acquired liabilities and false for not reporting new debt to old banks). These facts alone would require reversal of Counts 1 through 4. *Griffin v. United States,* 502 U.S. 46, 54 (1991). ("To say that a general verdict of guilty should be upheld though we cannot know that

it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.") quoting *Williams v. North Carolina,* 317 U.S. 287, 292 (1942).

Here, because of the contravening theories, the indictment's charges in and of themselves mandated a guilty verdict. Whenever the government charges two contradictory theories in a single count, one of which is impossible to achieve, and rejecting one theory requires a finding of guilty on the remaining theory, a guilty verdict is mandated.

It is noteworthy, that the $10 million in alleged undisclosed liabilities charged ten times in the first four counts were the results of loans which also generated $10 million in cash on the assets side of the balance sheet.

Under the charges in the first four counts,[5] the burden was shifted to the petitioner to prove that a single financial statement could embrace two separate dates many months apart. In light of the indisputable fact that the petitioner was borrowing approximately $1 million per month as charged in the indictment, the charges resulted in a directed verdict for the government.

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[5] Count 4 also required the petitioner to report $10 million in after-acquired debt on his balance sheet. App. B, 28a. Counts 5 and 6 charged that the petitioner knew that J. Lynn Helms ("Helms") had not signed the promissory note (App. B, 29a) and the loan guarantee(App. B, 30a). These also are not factual assertions and do not violate the statute.

THE TRIAL COURT'S ALTERING OF A DEFENSE SUBMITTED INSTRUCTION REMOVED ALL POSSIBILITY OF ACQUITTAL

Unsuccessful in convincing the trial judge that financial statements could *only* reflect assets and liabilities of a specific date, the petitioner submitted a theory of defense instruction. The instruction referenced the financial statements charged in the first three counts of the indictment (18 U.S.C. §1341, mail fraud) (App. B, 23a-24a) and required the government to prove as charged that the *"pretenses, representations and promises would be and were false and fraudulent when made."* The instruction also covered the statements in Counts 4, 5, and 6 and the single count indictment which charged *"did make and caused to be made a materially false statement"* (18 U.S.C. §1014, false statements), App. B, 28a-31a.

This instruction, one of only four submitted by the petitioner, read as follows:

> The Government must prove beyond a reasonable doubt that the statement made or signed by the Defendant *was untrue at the time the statement was made.* The fact that unforeseen subsequent events changed the circumstances upon which the statement was based does not affect the veracity of the statement previously made and subscribed to. RT192. (Emphasis added.)

The trial judge at the government's urging rejected petitioner's defense instruction:

> MS. HECK: Your Honor, it occurs to me that with the first sentence--it refers to "must be false when made," the government respectfully requests that for that instruction to be accurate, it should say "when made or submitted." Because the point is if somebody has a

> statement *which was made at a certain time and it was true, then knows that it is false, that has become false,* and then submits it knowing it since then to become false, that should not be excluded from the instruction. RT341 5570-1

The instruction given to the jury was as follows:

> The government must prove beyond a reasonable doubt that the statements *made* or *submitted*[6] by the Defendant was untrue at the time the statement was *made or submitted,* and was willfully *made or submitted* by the Defendant knowing the said statement was untrue when *made or submitted.* The fact that unforeseen subsequent events changed the circumstances upon which that statement was based does not affect the veracity of the statement previously *made or submitted.* RT344-6037 (Emphasis added.)

This altered instruction denied the petitioner his Sixth Amendment right to present a defense.[7] It directed the jury to convict based on statements true when made "becoming false." It is well settled that statements true when made cannot "become false." Conversely, false statements cannot become true. The above instruction, the trial judge's last instruction to the jury to convict, misdescribed the definition of a false statement affecting "the entire conduct of the trial from beginning to end." *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991). Moreover, this

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[6] This charge also directed the jury to convict on any statements submitted by the petitioner regardless of its author, a charge never made in the indictment.

[7] The instruction submitted by the petitioner was a correct statement of law and none of the remaining instructions addressed the requirement that false statements, representations and promises must be false when made as charged in the indictments.

instruction is not just a mere misdescription of an essential element, it completely eliminates the two prong test requirement of *Williams, supra,* redefines Fed. R.Evid 801(a) and the crime itself of making false statements. It removes the government's burden of proving, as required in *Williams,* that the statement or representation was a factual assertion and that the statement or representation must be capable of being characterized as true or false.

The question that cannot be answered under these charges is when or how the statement went from true to false, making it impossible to characterize the statement at any time as true or false. The instruction required the jury to view all statements through a defective definition of what constitutes a false statement.

Just by changing the last two words of the defense proposed instruction from "made and subscribed to" to "made or submitted" reversed the intent of the instruction which was to limit the jury's consideration to positive statements made by the petitioner. Instead, the government's charges and arguments were bolstered by giving the petit jury a specific instruction to support this theory that true statements were like chameleons, able to switch back and forth depending on events before and after the statement was made.

The petitioner contends that anytime the government, as here, *misdescribes the crime itself* over the objections of the defendant and through the alteration of a properly submitted defense instruction the error is not amenable to harmless error analysis at any stage of the proceeding, and is not subject to any procedural bar. (Emphasis added.)

Most important, the above instruction prohibited any possibility of acquittal. Without exception, all of the statements charged in the indictment were made at times far removed from when they were submitted. The charges in both the indictment

and jury instructions transformed the trial from a truth-seeking forum into a testing ground of theories apparently perceived by the government to be on the cutting edge of new law. These theories completely disregarded the requirement that false statements, pretenses, representations, and promises must be proven false *when made.* The government's closing argument underlines the constitutionally infirm options for conviction offered to the jury:

> MS. HECK: The indictment then goes forth to set forth what were the various parts of that scheme to defraud. One part was the submission of false statements, in particular, personal financial statements of Mr. Roggio and of *Mr. Helms* that were false at the time they were *submitted,* and that were *false before the date that they reflected* . . .
>
> The next part of the scheme and artifice to defraud that is alleged is that there was *non-disclosure of subsequent debt, debt that was incurred after, say, that 12-31-81 date but before the loan was actually entered into.* RT341-5608 (Emphasis added.)

As a result of the government's charges and arguments the jury was given the option of convicting based on ambiguous, undefined, and subjective occurrences before and after the statement was made, including if false statements were made by someone other than the petitioner. The lower courts' repeated silences have rendered the government's test results, at best, inconclusive.

The complete thrust of the government's argument at trial was that the petitioner did not fully reveal events before and after the statements were made, a requirement exclusive to this case. The jury was then instructed that "A statement or representation may also be 'false' or 'fraudulent' when it constitutes a *half-truth* or effectively *conceals* a material fact,

with intent to defraud." RT344-6029 (Emphasis added.) It cannot be gainsaid that the charges contained in the indictment and jury instructions resulted in the quintessential directed verdict.

THE COURT'S JURY INSTRUCTION CONSTRUCTIVELY AMENDED THE INDICTMENT AND BROADENED ITS CHARGES BASED ON TWO LEGALLY INSUFFICIENT THEORIES OF LAW AND JURISDICTION

All six counts of the indictment (App. B, 22a) identify just two banks, Barnett Bank and Pan American Bank, and two financial transactions. Counts 1, 4 and 5 concern the securing of a $500,000.00 line of credit from Barnett on or about October of 1982 and Counts 2, 3 and 6 concern a $500,000.00 loan secured from Pan American in January of 1983.[8]

Despite these facts, the government in a pre-trial motion wrote:

> This six count indictment charges both defendants with mail fraud and making false statements to federally insured banks consisting of false and misleading financial statements. While only two banks, Pan American Bank at Miami and Barnett Bank at Palm Beach are named as victims in the indictment, the government's evidence at trial will include proof of debts *incurred* by Roggio and his business partner, J. Lynn Helms at their business ventures at over *thirty financial institutions* resulting from over *100 different loans* totaling approximately $70 million which

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[8] The line of credit from Barnett was drawn down in increments of $350,000.00 as per Count 4 and $150,000.00 as per Counts 1 and 5; $400,000.00 had been repaid a year before the indictment was returned.

were obtained over a *two and one-half year period.* (Emphasis added.) RT38.

The indictment did not charge any fraud, false statements, representations or promises associated in any way with the thirty unidentified banks and one hundred loans, essential elements of both 18 U.S.C. §1014 and 18 U.S.C. §1341. No attempt was made by the government to introduce these unidentified banks and loans under Fed. R. Crim. P. 404(b).

Most important, the indictment did not charge any mailings to or from the 30 unidentified banks, all located over a thousand miles from the Southern District of Florida, nor did the indictment charge that any of the 30 banks were insured by the Federal Deposit Insurance Corporation. Putting aside the petitioner's sixth amendment right of Notice to prepare a defense, neither the government or the courts below have addressed the question as to how these 30 unidentified banks and 100 unidentified loans were within the jurisdiction of the court in the Southern District of Florida.

The jury instructions in their entirety did not address a single date, bank, victim, mailing, loan, or financial transaction. RT344,6021-6040.

The government attempted to explain the $69 million in unidentified loans from 30 unidentified banks at trial:

> THE COURT: Are you suggesting to me that if they borrowed 69 million dollars legitimately and only 1 million dollars fraudulently, that that would be part of a scheme to defraud? That doesn't even make sense, Caroline.
>
> MS. HECK: No, Your Honor, but if, in fact, their leverage situation and their concealment of certain of their legitimate loans was part of the defrauding of banks that were defrauded, it would be relevant. In

> fact, *the concealment of liability is at the heart of charge in this case.* Not all of those liabilities themselves need have been obtained by fraud in order properly to belong within the case. RT2831-2832 (Emphasis added.)

Under the theory of after-acquired debt, the government believed it could introduce the unidentified 30 banks and unidentified 100 loans without notice or a jurisdictional hook. Also, they could be introduced on the basis that a criminal violation could be had by proving that the financial statements provided to Barnett Bank and Pan American Bank, could "become false" if any of the unidentified loans from any of the unidentified banks were not reflected on the two financial statements when *submitted* for the credit.

The after-acquired debt instruction, *supra, page* 24, constructively amended the indictment. It broadened the charges from statements *made* to two banks for two loans to include 100 loans made from 30 banks. This new charge encompassing guilt when submitted was never made in the indictment and was based on a legally insufficient theory of law. Under this jury instruction, the petitioner was required to defend against 100 unidentified moving targets, (moving between true and false) none of which were charged in the indictment.

All eleven circuits have held that broadening of the indictment is reversible error per se. *See United States v. Floresca,* 38 F.3d 706 (4th Cir. 1994) FN.12 (collecting cases). The Court has never held otherwise.

In *Sullivan v. Louisiana, supra,* the Court held that the deprivation "of a defendant's Sixth Amendment right to trial by jury is a structural defect not amenable to harmless error analysis." In *Stirone v. United States, supra,* the Court wrote that a constructive amendment "destroy[s] the defendant's *substantial right* to be tried only on charges presented in an

indictment returned by a grand jury." It is hard to imagine that the constructive amendment in the instant case and the court's instruction defining false statements did *not* "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Olano,* 507 U.S. at 736 (1993). The jury verdict in this case was "utterly meaningless inasmuch as the deficienc[ies] caused the jury to have never reached a constitutional verdict to begin with." *Sullivan* at ____, 113 S.Ct. at 2082. (Emphasis added)

CONCLUSION

For all the reasons stated, the petitioner respectfully requests that this Honorable Court grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 96-4034 & 96-4412
Non-Argument Calendar

D. C. Docket Nos. 84-8069-CR, 93-8458-CV, 85-764-CR, 93-1842-CIV

VINCENT VICTOR ROGGIO,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Southern District of Florida

[stamp—FILED, U.S. COURT OF APPEALS, ELEVENTH CIRCUIT, JAN 21 1997, MIGUEL J. CORTEZ, CLERK]

(January 21, 1997)

Before ANDERSON, BLACK and CARNES, Circuit Judges.

PER CURIAM:

Following a lengthy trial, Vincent Roggio was convicted of various counts of mail fraud and causing materially false statements to be made to federally insured banks and to a federal savings and loan association. He received sentences the net effect of which was imprisonment for seven years. Roggio's convictions were affirmed on direct appeal. *United*

States v. Roggio, 863 F.2d 41 (11th Cir.), *cert. denied,* 490 U.S. 1109 (1989). Since then, Roggio has filed what the magistrate judge accurately described as "an avalanche of motions" attacking his convictions and sentences.

Now Roggio is back before us appealing the denial of his latest two 28 U.S.C. § 2255 motions. Every single claim raised in these latest motions was or could have been raised by Roggio on direct appeal or in any of the previous § 2255 motions that he has filed. Accordingly, all of the claims Roggio asserts in these petitions are barred under successive and abusive motions doctrine.

We note that Roggio's history of repetitive collateral attacks is precisely the kind of abuse that Congress intended to prevent with the recent amendments to 28 U.S.C. §§ 2244(b) and 2255. Those amendments substantially narrow the circumstances in which a second or successive motion can be filed, and they require an order from this Court before the district court is authorized to consider such a motion. Those amendments probably do not apply to this proceeding, because the motions in this case had already been dismissed, and the appeal from that dismissal was already underway, at the time the amendments went into effect. However, we do not need to decide that question, because even under preexisting law Roggio is not entitled to have his latest motions heard on the merits. The amendments to 28 U.S.C. §§ 2244(b) and 2255 will certainly apply with full force should Roggio attempt to collaterally attack his convictions and sentences again in the future.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1456-CIV-SPELLMAN
89-8320-CIV-SPELLMAN

VINCENT VICTOR ROGGIO,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendants.

ORDER DENYING DEFENDANT'S 2255 MOTION

[stamp—FILED by /s/ JE D.C., OCT 24 1989, Robert M. March, Clerk, U.S. Dist Ct, S.D. of Fla Miami]

THIS CAUSE came to be heard before the Court in the above-styled causes, based on the motion for Habeas Corpus pursuant to Title 28, United States Code, Section 2255, requesting collateral relief from the convictions in the criminal cases set forth above.

For the sake of clarity, the Court will refer to the specific item as it was numbered by the Petitioner so that the parties and any appellate court will fully understand the reasoning of this Court in denying the requested relief. It should be borne in mind at the outset that this matter was completely dealt with, with regard to most of the issues sought to be presented here, by the 11th Circuit Court of Appeals on direct appeal. See *United States v. Roggio,* 863 F.2d 41 (11th Cir. 1989), *reh. denied* ____F.2d____, *cert. denied,* ____U.S.____.

Where such matters have in fact been fully and completely disposed of on direct appeal, they are not the subject of reconsideration by the trial court pursuant to a proceeding

instituted under Title 28, U.S.C., section 2255. *United States v. Hobson,* 825 F.2d 364, 366 (11th Cir. 1987); *Bucklew v. United States,* 575 F.2d 515, 517-518 (5th Cir. 1978). As it pertains to the specific grounds set forth as Ground One up to and including Ground Ten, based upon the above and foregoing citations, this Court does hereby find that these matters were decided on direct appeal, properly rejected by that Court, and cannot be the subject matter of these proceedings.

That therefore leaves for discussion those items in grounds set forth by the petitioner as "Ground Zero", "Ground Double Zero"' and "Ground Triple Zero". Although the Court finds these matters to be totally without merit, it will specifically, however briefly, discuss each of these grounds and the Court's reasons for denying relief pursuant to them.

GROUND ZERO

Movant claims essentially three defects flowing from the jury instructions: First, that the instruction on 18 U.S.C. section 2 was incorrect; second, that the signature-authorization instruction was incorrect; and third, that the court improperly handled the jury's question about the signature authorization instruction.

Procedurally, all three claims share a fatal infirmity. None of the three was raised before the Court at trial, despite numerous opportunities to raise them. The district Court conducted extensive discussions with the parties about the proposed charges before they were given to the jury. Movant and his two stand-by counsel, Zenobie and Kainen were present at and took part in these discussions. Both before the instructions were read to the jury and immediately after, the Court inquired of the parties whether there were any objections. Kainen and the Defendant personally assured the Court that the defense had no objections, see vol. 36:6014,6041.

Inasmuch as Movant now objects to the Court's handling of the jury's question about the signature-authorization instruction, Movant personally stated his approval of the procedure the Court followed, see Vol 36:6047. It was the defense who suggested the instruction already given was sufficient, 36:6049. He may not now argue that the jury should have been given further instruction.

All three claims were matters not objected to at trial. If this were a direct appeal they could be addressed only if they were plain errors affecting substantial rights, pursuant to Fed. R. Crim. Pro. 52(b), *United States v. Frady,* 456 U.S. 152,163 and 163-64 n.14. *U.S. v Hook,* 781 F.2d 1166, 1172 (6th Cir. 1986); *United States v. Thevis,* 665 F.2d 616, 645 (5th Cir. Unit B 1982). In a 2255 motion, which is a collateral attack, movant's burden is even heavier than a stringent plain-error standard, *Frady,supra* 456 U.S. at 166. ("To obtain collateral relief a prisoner must clear a significantly higher standard than would exist on direct appeal.") See also *Alexander v. Dugger,* 841 F.2d at 374-75.

Under *Frady,* the 2255 movant must show "cause and prejudice". He must show "both (1) 'cause' excusing his double default, and (2) 'actual prejudice' resulting from the errors of which he complains. . . . [H]e must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady* at 168, 170 [Emphasis in original.]

Movant has met neither prong of the cause-and-prejudice test. He has offered no explanation at all, let alone a convincing one, for his "double procedural default," that is, his failure to object to the jury instructions either at trial, where he had the assistance of counsel Kainen, whose competence he does not fault, or on appeal, where he was

represented by his original counsel of choice, Alexander Hewes, whose competence he likewise does not question. As to the second prong, prejudice, movant engages in much hyperbole as to why his trial was a fiasco due to these instructions, but provides no concrete support, and does not even make a claim as strong as the unsuccessful claim in *Frady,* that in a murder case the government had been relieved of its burden of proving malice. Movant also cannot show prejudice because there was overwhelming evidence establishing his guilt. Movant does not meet the procedural threshold set forth in *Frady* for seeking collateral relief from a previously unobjected to jury instruction.

In his reply brief, movant attempts to point out several points in the trial transcript where movant objects to the jury instructions. In the first instance, movant points to a passage court there is no ground for attack. "[I]t must be assumed that [the jury] had determined they did not need an answer to their inquiry in order to reach a verdict." *United States v. Spagnolo,* 546 F.2d 1117, 1120 (4rth Cir. 1976).

GROUND DOUBLE ZERO

Although here movant's assertions are phrased in the form of constitutional arguments, to wit, that movant was denied his right to be tried on charges brought against him by a Grand Jury, essentially the same assertions were made in novant' appeal to the 11th Circuit beginning at page 51 of his appellant's brief. The 11th Circuit concluded that the evidence clearly supported movant's conviction. Although movant alleges a variance between the indictment and the evidence adduced at trial, he argues that the evidence was insufficient to convict him of those charges. This Court does not have jurisdiction to disturb the 11th Circuit's findings in that regard.

Assuming *arguendo* that the variance argument were not identical to the insufficiency of the evidence argument raised on appeal, the government is correct in pointing out that it is sufficiently similar that movant would not be able to show cause excusing his procedural default for not making the variance argument on appeal.

GROUND TRIPLE ZERO

The movant's assertion that he was "severely prejudiced by the unfounded assumption on the part of the trial judge that he was trifling with the Court" states no basis for collateral relief. The claim has no constitutional dimensions. There is no support in the record for it, nor any on its face. Movant cites no authority to the effect that the facts he alleges in his allegations establishes a ground for collateral attack.

In summary, grounds zero through triple zero do not state a cognizable claim for collateral relief. All other assertions in movant's 2255 petition were raised and rejected on direct appeal and therefore, cannot be the subject of collateral review. Accordingly and upon *de novo* review of the record, it is hereby

ORDERED AND ADJUDGED that the petition for *habeas corpus* relief is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida this 24 day of Oct., 1989.

/s/ Eugene Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8425-Civ-ROETTGER
84-8069-Cr-SPELLMAN

VINCENT VICTOR ROGGIO,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. §2255 and was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

PROCEDURAL HISTORY

The movant was charged on August 7, 1984, in a six-count indictment, Case Number 84-8069-Cr-SPELLMAN (Government's Response, Attachment 1). Counts I, II and III charged mail fraud, in violation of 18 U.S.C. §1341; counts IV, V and VI charged causing materially false statements to be made to federally insured banks, in violation of 18 U.S.C. §1014. On October 3, 1985, the movant was indicted again in this District, Case Number 85-764, in a single-count indictment which charged causing materially false statements to be made to a federally insured savings and loan association, in violation of 18 U.S.C. §1014 (Government's Response, Attachment 2).

Case Numbers 84-8069 and 85-764 were consolidated. Following a 10 1/2 week jury trial, the movant was convicted on all counts. On the first indictment, he was sentenced

to five-year terms on each of the mail fraud charges, Counts I, II and III, with two of the terms to run consecutively, and to five years probation on the false statement charges, Counts IV, V and VI, with restitution as a condition of probation. On the second indictment, he was sentenced to two years' incarceration, to run consecutively to the other jail terms, for a total term of imprisonment of 12 years (Government's Response, Attachment 3).

The movant appealed from his convictions, which were affirmed by the Eleventh Circuit Court of Appeals. *United States v. Roggio,* 863 F.2d 41 (11th Cir.), *cert. denied,* ____ U.S. ____, 109 S.Ct. 3164 (1989).

The movant filed a motion in the District Court for relief pursuant to 28 U.S.C. §2255 (Docket Entry 363), together with ancillary pleadings (see, e.g., Docket Entries 367, 372, 375, 376, 377), which relief was denied, based on *de novo* review of the record (Docket Entry 379). The movant then sought to appeal from this denial (Docket Entry 382), which appeal was dismissed as premature owing to the movant's continued filings in the District Court. Both before and after this dismissal, the movant continued to file new pleadings in the District Court, including motions for reconsideration (Docket Entries 380, 381, 384, 422, 432); for dismissal of the indictment (Docket Entries 395, 411, 414); and for relief pursuant to Fed.R.Crim.P. 35(a) (Docket Entry 383). These motions to the District Court were denied (Docket Entries 405, 408, 410, 423, 424, 428, 433), and the movant filed further Notices of Appeal therefrom (Docket Entries 427, 429, 434).

In the Eleventh Circuit, two of these further notices of appeal (Docket Entries 427, 434) ripened into appeals which were briefed on the merits, consolidated, and disposed of by the Court of Appeals with a *per curiam* affirmance of the

District Court's action in the collateral attacks.[1] *United States v. Vincent Victor Roggio,* Case Number 90-5247; 90-5412 (11th Cir. July 2, 1991) (unpublished) (Government's Response, Attachment 4).

While this Eleventh Circuit consolidated appeal was pending, the movant filed another motion for relief pursuant to Fed.R.Crim.P. 35(a) (Docket Entry 436), which the District Court denied for lack of jurisdiction owing to the pending appeal (Docket Entry 445). The movant renewed this motion for relief pursuant to Rule 35 (Docket Entry 454). It was denied (Docket Entry 458); the movant filed a Notice of Appeal (Docket Entry 459), which appeal (Eleventh Circuit Case Number 92-5340) was dismissed for non-prosecution by the movant (Government's Response, Attachment 5).

In his initial motion pursuant to §2255 and related pleadings, the movant raised the following grounds for relief:

> (1) Counts I, II and III do not allege a cognizable federal offense for these three counts fail to charge four essential elements necessary to charge a defendant with making a false statement to a federally insured bank;
>
> (2) An essential element of both bank fraud and mail fraud is the identification of the victim or target of the alleged scheme to defraud;
>
> (3) Counts I, II and III should be dismissed, for without the identification of whom the alleged victims are, the indictment does not permit the appellant to plead double jeopardy;

---

[1] In the Eleventh Circuit, Docket Entry 427 became Case Number 90-5247; Docket Entry 429 became Case Number 90-5258; Docket Entry 434 became Case Number 90-5412. Case Numbers 90-5247 and 90-5412 were consolidated and ruled on; Case Numbers 90-5258 was dismissed by the Eleventh Circuit as moot, see Docket Entry 439.

(4) Counts I, II and III should be dismissed, for these counts do not allege that the appellant deprived any victim or victims of money or property required under *McNally;*

(5) The aforementioned issues were exacerbated by the Court's jury instructions;

(6) The trial court's jury instructions constructively amended the indictment (by failing to mention as to Counts I, II and III that the victim banks were insured by the FDIC);

(7) The indictment improperly charged in Counts I, II and III violations of 18 U.S.C. §1341 where the criminal violations alleged were violations of 18 U.S.C. §1014;

(8) The trial court lacked venue and jurisdiction to try the case in the Southern District of Florida;

(9) The movant was indicted and convicted on a theory of criminality which has no foundation in law and fact;

(10) The court erred in altering its pattern jury instruction and permitting the Government to argue that a co-defendant's guilty plea was substantive evidence of the movant's guilt;

(11) The movant was denied his Sixth Amendment right to counsel and his right to be present at a critical stage of the proceedings when the trial court had an unrecorded meeting in Chambers on the last day of trial, during which counsel for the movant and the Government discussed the movant's letter relating to his counsel's lack of preparation and unwillingness to defend;

(12) The movant never waived his right to counsel;

(13) The movant was denied his theory of defense instruction;

(14) The theory of defense instruction utilized by the Court resulted in the elimination of the Government's burden of proof on the issue of willfulness.

(Briefs on appeal on the movant's initial requests for post-conviction relief, Government's Response, Attachments 6-8.)

The instant motion (designated by the movant as a petition for writ of habeas corpus, pursuant to 28 U.S.C. §§2241 and 2243, but in actuality a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255),[2] raises the following grounds for relief:

(1) The movant was sentenced to ten years imprisonment for making two false statements to two federally insured banks, when the maximum sentence was two years for each false statement;

(2) The sentencing judge was without jurisdiction to sentence the movant because the Government improperly included two elements of bank fraud and one element of mail fraud in Counts I through III of the indictment, and charged two separate jurisdictional elements of bank fraud in Counts IV through VI; and

(3) The court illegally sentenced the movant to 15 years imprisonment on Counts I through III when these counts failed to allege the essential elements of bank fraud.

---

[2] The motion was filed in the Western District of Tennessee. It was construed by that court as a motion pursuant to 28 U.S.C. §2255 and transferred to this District. In the Order Construing Habeas Petition as Motion Under 28 U.S.C. §2255 and Transferring Case (attached to this Report), the court noted that the movant had filed a prior petition under 28 U.S.C. §2241.

The Government, in its Response, contends that the motion should be denied as a successive petition or for abuse of the writ; as procedurally barred for failure to raise the issues on direct appeal; and as devoid of merit. In a Reply to the Government's Response, the movant argues that this Court should consider his motion because the district court and the Eleventh Circuit Court of Appeals have refused to address the merits of the issues in prior proceedings; because the issue of lack of jurisdiction may be raised at any time; and the interests of justice require consideration of the movant's claims.

RECOMMENDATIONS OF LAW

Rule 9(b) of the Rules Governing Habeas Corpus Proceedings provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In *McCleskey v. Zant*, ____ U.S. ____, 111 S.Ct. 1454 (1991), the Supreme Court established the standards which are to be applied in determining whether a habeas petitioner has abused the writ. The Court held that the "cause and prejudice" analysis utilized in deciding whether a habeas claim is barred by procedural default is applicable to a determination of inexcusable neglect in the abuse of the writ context. *Id.*, at 1468.

In reaching this conclusion, the Court noted that the "doctrines of procedural default and abuse of the writ impli-

cate nearly identical concerns flowing from the significant costs of federal habeas corpus review." *Id.* These considerations include the facts that the writ "strikes at finality"; that "collateral litigation places a heavy burden on scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes"; and that "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*, at 1468-1469.

Accordingly, the *McCleskey* Court set forth the following procedures to be employed where new grounds are alleged in a second or subsequent habeas corpus petition:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that the petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failure to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot meet this standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonethless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.

Id., at 1470.

The Court also observed that in procedural default cases, the cause standard requires the petitioner to show that some objective factor external to the defense impeded counsel's efforts to raise the claim at the trial level. Objective facts sufficient to demonstrate cause include interference by officials that makes compliance with the state's procedures impracticable; a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. *Id.* The Court also noted that a petitioner who cannot demonstrate cause and prejudice, may nevertheless come within the miscarriage of justice exception to these requirements where he "supplements a constitutional claim with a 'colorable showing of factual innocence.' " *Id.*, at 1471, quoting *Kuhlman v. Wilson,* 477 U.S. 436, 454 (1986).

In the instant case, it appears that the movant has raised the same issues asserted in his motion in many of his myriad of prior pleadings attacking his conviction. Indeed, the movant concedes this when he asserts in his Reply to the Government's Response that he "has attempted for 2 1/2 years to have both the district court and the Eleventh Circuit Court of Appeals address *any* of his issues including some of those contained in this writ." (Reply, p. 2).

To the extent that the issues raised in this motion were raised in prior collateral attacks filed by the movant, they constitute a successive petition which should be dismissed pursuant to Rule 9(b). If the movant's rephrasing of these issues in jurisdictional terms is construed by the Court as transforming the issues into "new and different grounds," then the motion should be denied as an abuse of the writ.

The movant has not alleged any cause for his failure to advance the argument that the sentencing court lacked jurisdiction, other than to point out that his prior attempts to attack his conviction were unsuccessful in the trial and

appellate courts. Moreover, as the Government points out in its Response, the movant cannot demonstrate prejudice because his claims are utterly devoid of merit (Government's Response, pp. 16, 20-25). Finally, the movant cannot bring his claims within the miscarriage of justice exception to the cause and prejudice requirements, as he had made no colorable showing of factual innocence.

As noted above, the *McCleskey* court recognized the heavy burden collateral litigation imposed upon scarce federal judicial resources, thereby limiting time which may be spent resolving primary factual disputes. The instant case clearly illustrates the legitimacy of that concern. The movant has caused the expenditure of countless hours of judicial time in the trial and appellate courts in his efforts to litigate and relitigate the same issues in various guises. The undersigned believes, based upon the principles set forth in *McCleskey* and in 28 U.S.C. §2244, that no additional expenditure of resources is warranted, and the movant's conviction should be deemed valid and final.

CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motion to Vacate, Set Aside, or Correct Sentence be DENIED.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Norman C. Roettger, Chief United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982) (en banc).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 23rd day of April, 1992.

/s/ Lurana S. Snow
UNITED STATES MAGISTRATE JUDGE
LURANA S. SNOW

Copies to:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-1842-Civ-ROETTGER
85-764-Cr-SPELLMAN

VINCENT VICTOR ROGGIO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

CASE NO. 93-8458-CIV-ROETTGER
84-8069-CR-SPELLMAN

VINCENT VICTOR ROGGIO

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the movant's Motion to Vacate, Set Aside, or Correct Sentence filed pursuant to 28 U.S.C. § 2255 and was referred to United States Magistrate Judge, Lurana S. Snow, for report and recommendation.

This movant has filed, over the course of the past ten years, an avalanche of motions attacking his convictions and the sentences imposed in Case Number 85-764-CR-ROETTGER (SPELLMAN) and 84-8069-CR-ROETTGER (SPELLMAN). Two sets of these pleadings, in each of the criminal

case, were deemed motions to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

In 1992, the undersigned issued a Report and Recommendation as to the movant's second collateral attack on his convictions (as to which the Government had argued that the motions should be dismissed pursuant to Rule 9(b) of the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, as successive motions and for abuse of the writ). The undersigned recommended that the motions be dismissed, citing *McCleskey v. Zant,* 111 S.Ct. 1454 (1191), and denied as utterly devoid of merit.

This Court adopted the report and recommendation and denied the motions. The movant elected not to appeal, despite his proclivity for litigation at the trial and appellate levels. The Report and Recommendation issued in April 1992 (a copy of which is attached) concluded with the following comments:

> As noted above, the *McCleskey* court recognized the heavy burden collateral litigation imposed upon scarce federal judicial resources, thereby limiting time which may be spent resolving primary factual disputes. The instant case clearly illustrates the legitimacy of that concern. The movant has caused the expenditure of countless hours of judicial time in the trial and appellate courts in his efforts to litigate and relitigate the same issues in various guises. The undersigned believes, based upon the principles set forth in *McCleskey* and in 28 U.S.C. § 2244, that no additional expenditure of resources is warranted, and the movant's conviction should be deemed valid and final.

Undaunted, the movant, who is now on parole, has filed yet another § 2255 motion in each of his criminal cases. Once again, the Government has pleaded, with clarity and

particularity, that these motions should be dismissed pursuant to Rule 9(b) as successive motions and for abuse of the writ. And again, the movant has demonstrated no valid cause and prejudice for his failure to raise any arguably new issues in his prior § 2255 motions.

The undersigned adopts the arguments set forth in the Government's response (as corrected) pertaining to the myriad procedural bars to the instant motions, and declines to reach the merits of the movant's claims. *Macklin v. Singletary,* 24 F.2d 1307 (11th Cir. 1994). The instant motions should be summarily denied, and this Court may wish to consider the admittedly drastic, but not unprecedented, step of enjoining the movant from filing any further attacks on his convictions in the instant criminal cases.

CONCLUSION

This Court has reviewed carefully the record in this matter as well as the applicable law, and being fully advised in the premises, it is hereby

RECOMMENDED that the Motions to Vacate, Set Aside, or Correct Sentence be DISMISSED PURSUANT TO RULE 9(b), RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE.

The parties will have ten days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with The Honorable Norman C. Roettger, Chief United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal factual findings contained herein. *Nettles v. Wainwright,* 677 F.2d 404 (5th Cir. 1982) (*en banc*).

DONE AND SUBMITTED at Fort Lauderdale, Florida, this 12th day of October, 1995.

/s/ Lurana S. Snow
LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

Copies to:

Mr. Vincent Victor Roggio
William M. Kunstler, Esq.
Vincent D. Roggio, Esq.
Scott Srebnick, Esq.
AUSA Caroline Heck (MIA)

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 84-8069 CR-SPELLMAN
18 U.S.C. §1014; 18 U.S.C. §1341; 18 U.S.C. §2

UNITED STATES OF AMERICA

v.

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

INDICTMENT

The Grand Jury charges that:

COUNT I

1. At all times material to this indictment:

A. VINCENT VICTOR ROGGIO was a principal of Devon Industries, Ltd., and its subsidiary and related business entities, and held himself out to be Chairman of the Board of Devon Industries, Ltd.

B. CHARLES J. ASCENZI was an employee and agent of VINCENT VICTOR ROGGIO and an officer of Devon Industries, Ltd.

C. Devon Industries, Ltd. was a Virginia corporation with activities in other states, including Florida and Pennsylvania, and with headquarters in Telford, Pennsylvania, from which headquarters was conducted business of VINCENT VICTOR ROGGIO and of Devon Industries, Ltd. and its subsidiary and related business entities.

D. Among the business associates of VINCENT VICTOR ROGGIO was J. Lynn Helms. Helms was a principal of

Devon Industries, Ltd. and was associated with VINCENT VICTOR ROGGIO in business ventures, in the Southern District of Florida and elsewhere, including but not limited to R & H Investment Co., Inc.; Prince Properties, Ltd.; Flagler Corporate Center; Devon Shipping, Ltd.; and Birchminster Farms Inc.

E. Barnett Bank of Palm Beach County was a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with offices in Delray Beach, in the Southern District of Florida.

F. Pan American Bank, N.A. was a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, with offices in Miami, in the Southern District of Florida.

2. Between in or about May 1981, and in or about December 1983, in excess of $70,000,000 (seventy million dollars) was borrowed by or in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms, and their business ventures, including Devon Industries, Ltd., from financial institutions in the Southern District of Florida and elsewhere, including Barnett Bank of Palm Beach County and Pan American Bank.

3. From at least as early as May 1981 and continuing up to and including December 1983, the exact dates being unknown to the grand jury, in the Southern District of Florida and elsewhere, the defendants

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

did knowingly, willfully and unlawfully, devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, well knowing that the

pretenses, representations and promises would be and were false and fraudulent when made.

4. It was the essence of the scheme and artifice to defraud that the defendants would seek and obtain loans from financial institutions for and in the names of VINCENT VICTOR ROGGIO, J. Lynn Helms and their business ventures by fraud, including misstating assets, understating liabilities and deceiving the lenders as to who would and did sign loan documents and guarantees.

5. It was a part of the scheme and artifice to defraud that the defendant VINCENT VICTOR ROGGIO knowingly and willfully would and did submit and cause to be submitted to financial institutions, including Barnett Bank of Palm Beach County and Pan American Bank, personal financial statements of himself and of J. Lynn Helms, which personal financial statements contained false and misleading representations, including that:

A. As of July 1, 1981, VINCENT VICTOR ROGGIO's reported assets included a $1,600,000 asset of two refrigerated cargo vessels, the Unicorn II and III.

B. As of July 1, 1981, VINCENT VICTOR ROGGIO had total liabilities of $1,705,000.

C. As of December 31, 1981, VINCENT VICTOR ROGGIO and J. Lynn Helms owned interests totaling 87% ownership in Miami investment land, which land was to be developed into Flagler Corporate Center.

D. As of December 31, 1981, VINCENT VICTOR ROGGIO had total liabilities of $3,000,000 (three million dollars).

E. As of June 30, 1982, VINCENT VICTOR ROGGIO and J. Lynn Helms owned interests totally 87% ownership in Miami investment land, which land was to be developed into Flagler Corporate Center.

F. As of December 31, 1982, VINCENT VICTOR ROGGIO had total liabilities of $5,350,000.

6. It was also a part of the scheme and artifice to defraud that in seeking loans from financial institutions, VINCENT VICTOR ROGGIO knowingly and willfully would and did fail to disclose, and would and did conceal, liabilities incurred after those disclosed to prospective lenders in personal financial statements.

A. With regard to $500,000 loaned in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms by Barnett Bank of Palm Beach County between October 1982 and December 31, 1982, the defendant VINCENT VICTOR ROGGIO did fail to disclose and did conceal in excess of approximately $10,000,000 (ten million dollars) in liabilities incurred after those disclosed to Barnett Bank of Palm Beach County in personal financial statements of VINCENT VICTOR ROGGIO and J. Lynn Helms, the aforesaid undisclosed liabilities including $800,000 borrowed by VINCENT VICTOR ROGGIO from Pan American Bank in June 1982.

B. With regard to $500,000 loaned to VINCENT VICTOR ROGGIO by Pan American Bank in January 1983, VINCENT VICTOR ROGGIO did fail to disclose and did conceal in excess of approximately $10,000,000 (ten million dollars) in liabilities incurred after those disclosed to Pan American Bank in personal financial statements of VINCENT VICTOR ROGGIO and J. Lynn Helms, the aforesaid undisclosed liabilities including $500,000 borrowed in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms from Barnett Bank of Palm Beach County between October 1982 and December 31, 1982.

7. It was also a part of the scheme and artifice to defraud that the defendants VINCENT VICTOR ROGGIO and CHARLES J. ASCENZI knowingly and willfully would and

did hold out as genuine signatures falsely purporting to be those of J. Lynn Helms on loan documents and guarantees submitted to financial institutions, including Barnett Bank of Palm Beach County and Pan American Bank.

8. It was also a part of the scheme and artifice to defraud that the defendant CHARLES J. ASCENZI knowingly and willfully would and did sign J. Lynn Helms' name to loan documents and guarantees, including but not limited to:

A. A promissory note, dated December 20, 1982, in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms, for the sum of $150,000 to Barnett Bank of Palm Beach County.

B. A personal loan guarantee in the name of J. Lynn Helms, dated January 11, 1983, and notarized on or about January 31, 1983, guaranteeing a $500,000 loan by Pan American Bank to VINCENT VICTOR ROGGIO.

9. On or about December 13, 1982, in the Southern District of Florida, and elsewhere, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

did knowingly, willfully and unlawfully cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, according to the direction thereon, a letter to Messrs. J. Lynn Helms and Vincent Roggio, P.O. Box 193, Devon Industries, Ltd., Telford, Pennsylvania, 18969 from Barnett Bank of Palm Beach County, Florida containing an unsigned promissory note for $150,000.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT II

1. The allegations contained in paragraphs 1 through 8 of Count I are repeated and realleged and incorporated herein by reference as if set forth at length.

2. On or about January 24, 1983, in the Southern District of Florida, and elsewhere, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

did knowingly, willfully and unlawfully cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, according to the direction thereon, a letter to Vincent Roggio, c/o Prince Properties, Ltd., P.O. Box 193, Telford, Pennsylvania 18969, from Pan American Bank, in Miami, Florida containing a $500,000 loan guarantee in the name of J. Lynn Helms.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT III

1. The allegations contained in paragraphs 1 through 8 of Count I are repeated and realleged and incorporated herein by reference as if set forth at length.

2. On or about January 31, 1983, in the Southern District of Florida, and elsewhere, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants,

VINCENT VICTOR ROGGIO,
and
CHARLES J. ASCENZI

did knowingly, willfully and unlawfully cause to be delivered by mail by the United States Postal Service according to the direction thereon, a letter to Pan American Bank, 250 Southeast First Street, Miami, Florida 33131, from Telford, Pennsylvania, containing a notarized $500,000 loan guarantee in the name of J. Lynn Helms.

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT IV

1. The allegations contained in paragraph 1 of Count I are repeated and realleged and incorporated herein by reference as if set forth at length.

2. Between on or about September 1, 1982, and on or about October 5, 1982, at Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

VINCENT VICTOR ROGGIO

knowingly and willfully did make and cause to be made a materially false statement and report for the purpose of influencing the action of Barnett Bank of Palm Beach County upon an application for a loan, and a loan, in the sum of $350,000 in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms, in that the defendant VINCENT VICTOR ROGGIO submitted and caused to be submitted to Barnett Bank of Palm Beach County a personal financial statement, dated as of December 31, 1981, which personal financial statement listed VINCENT VICTOR ROGGIO's total liabilities at $3,000,000 (three million dollars), when in truth and in fact, as VINCENT VICTOR ROGGIO well knew, his total liabilities as of December 31, 1981, and between on or about September 1, 1982 and on or about October 5, 1982, were in excess of approximately $10,000,000 (ten million dollars).

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT V

1. The allegations contained in paragraph 1 of Count I are repeated and realleged and incorporated herein by reference as if set forth at length.

2. On or about December 20, 1982, at Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

knowingly and willfully did make and cause to be made a materially false statement and report for the purpose of influencing the action of Barnett Bank of Palm Beach County upon a $150,000 loan made in the names of VINCENT VICTOR ROGGIO and J. Lynn Helms in that the defendants, VINCENT VICTOR ROGGIO and CHARLES J. ASCENZI, did submit and cause to be submitted to Barnett Bank of Palm Beach County, a promissory note for $150,000 purporting to bear J. Lynn Helms' signature when in truth and fact, as the defendants VINCENT VICTOR ROGGIO and CHARLES J. ASCENZI well knew, J. Lynn Helms had not signed the promissory note.

All in violation of Title 18, United States Code, Sections 1014 and 2.

COUNT VI

1. The allegations contained in paragraph 1 of Count I are repeated and realleged and incorporated herein by reference as if set forth at length.

2. In or about January 1983, at Dade County, in the Southern District of Florida, and elsewhere, the defendants

VINCENT VICTOR ROGGIO
and
CHARLES J. ASCENZI

knowingly and willfully did make and cause to be made a materially false statement and report for the purpose of influencing the action of Pan American Bank upon a $500,000 loan to the defendant VINCENT VICTOR ROGGIO, in that the defendants, VINCENT VICTOR ROGGIO and CHARLES J. ASCENZI, did submit and cause to be submitted to Pan American Bank a personal loan guarantee in the name of J. Lynn Helms for the aforesaid loan, purporting to bear J. Lynn Helms' notarized signature, when in truth and fact, as the defendants VINCENT VICTOR ROGGIO and CHARLES J. ASCENZI well knew, J. Lynn Helms had not signed the personal loan guarantee.

All in violation of Title 18, United States Code, Sections 1014 and 2.

A TRUE BILL

/s/ Maria P. Little
FOREPERSON

/s/ [Illegible] for
STANLEY MARCUS
UNITED STATES ATTORNEY

/s/ Elizabeth A. Jenkins
ELIZABETH A. JENKINS
ASSISTANT UNITED STATES ATTORNEY

/s/ Caroline Heck
CAROLINE HECK
ASSISTANT UNITED STATES ATTORNEY

MPS:pas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 85-764 CR-KING
18 U.S.C. 1014

UNITED STATES OF AMERICA

v.

VINCENT VICTOR ROGGIO

INDICTMENT

[Filed by _____ DC, 1985 OCT -3 PM 12:29, Robert M. March, Clerk, US Dist. Ct., SD of Fla, Miami]

The Grand Jury charges that:

On or about July 6, 1982, at Miami, Dade County, in the Southern District of Florida, the defendant,

VINCENT VICTOR ROGGIO,

knowingly and willfully did make and cause to be made a materially false statement and report for the purpose of influencing the actions of the Peninsula Federal Savings and Loan Association, whose deposits were insured with the Federal Savings and Loan Insurance Corporation, concerning a mortgage loan to the defendant in the amount of $750,000.00, in that the defendant, Vincent Victor Roggio, falsely swore in a non-identity affidavit that he was not the same Vincent Victor Roggio named or referred to in the case of *Keevan and Son, Inc. v. Vincent Roggio, et al,* case no. 79-1369-Civ-EPS, and in the matter of an *Involuntary Petition in Bankruptcy* filed May 27, 1980, by Vincent Roggio, Pelican Yacht Marina, Fort Pierce, Florida, case no. 80-00632; when in truth and in fact, as he then and there well knew, he was the same Vincent Victor Roggio so named and

referred to; all in violation of Title 18, United States Code, Section 1014.

A TRUE BILL

/s/ Priscilla C. Dobler, Deputy
FOREPERSON

/s/ Joseph F. McCarthy for
LEON B. KELLNER
UNITED STATES ATTORNEY

/s/ M. P. Sullivan
MICHAEL P. SULLIVAN
ASSISTANT U.S. ATTORNEY
SENIOR LITIGATION COUNSEL

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 96-4034 & 96-4412

VINCENT VICTOR ROGGIO,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA
Respondent-Appellee.

**On Appeal from the United States District Court
for the Southern District of Florida**

[stamp—FILED, U.S. COURT OF APPEALS, ELEVENTH CIRCUIT, MAR 20 1997, MIGUEL J. CORTEZ, CLERK]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ____F.2d____).

Before: ANDERSON, BLACK, AND CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illeg.] Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX D

EXCERPTS FROM TRANSCRIPT OF TRIAL

[17] files down to Miami.

I spoke to him Friday, which would have been January the 8th, I believe, about bringing these files down, and I am talking about all the files. I didn't talk to him on Monday.

THE COURT: You are talking about all the files?

MR. ZENOBI: Yes. The reason being I talked to him Monday again, which would have been January the 12th, about bringing these files down. He has not gotten back to me.

The reason being that the Government's position now is that they are pretty much going up and down the Eastern Seaboard in the introduction of the evidence as opposed to just sticking with the two banks in Florida, and as opposed to the usual practice of alleging 404(b), their position is that the entire matter is a common scheme.

Whether I agree or disagree with that matter, I have to prepare for trial with that. Consequently, it becomes necessary to get the entire group of boxes that they have in West Palm Beach down here.

THE COURT: What are we talking about by way of filing cabinets? If we had filing cabinets, how many would you fill?

MS. HECK: Your Honor, I really am sorry I don't have the agent here, because it is always difficult to get [18] conversations at second and third-hand.

My agent was quite explicit that his understanding with Mr. Zenobi was that Mr. Zenobi did not want or need all of the documents down here physically; that what he wanted down here physically were the Roggio statements.

I don't think it is possible for us to get into a discussion of who said what at what time. If Mr. Zenobi wants all the documents down here, we will endeavor to get them, and that has been our position.

THE COURT: Apparently, that is what he is asking for.

MS. HECK: But that is not what my agent said he and Mr. Zenobi discussed.

THE COURT: Apparently, that is what he is asking for.

MR. ZENOBI: As far as the representations that are being made by the Government concerning my conversations with the agent, that is correct. But the representations made by the Government as to the exposition of evidence that they intend to produce at trial, that has made me aware of the extensiveness of things that are going to be produced by defense at trial.

THE COURT: So you did say what you are attributed to saying to Mr. Cavanaugh, but you have now altered your thinking in light of the position taken by the Government [19] and you desire everything down here?

MR. ZENOBI: Well, I think at some time we are simply going to be placed in a position where we are going outside of the two banks that we are talking about.

THE COURT: I think Miss Heck has made that clear.

MR. ZENOBI: So with that understanding, with the fact that I have to make things known to Miss Heck, I simply would like to take a look at those matters.

I realize we are a little behind schedule, but if the agent can get it down here, I will adjust my —

THE COURT: All right.

MS. HECK: Let me emphasize, by the way, Mr. Zenobi, and Your Honor, that the documents, the 821 which I gave

to Mr. Zenobi, contain all the evidence we intend to introduce, including from the other banks. So you should have in hand the ones from the other banks we intend to introduce.

And I will talk to —

THE COURT: So at least he will know what banks you are talking about?

MS. HECK: Yes, sir.

He drew up some names on that list, but I will talk to Cavanaugh about getting all the documents down here. But that is a production, and it can't be done — I mean, we were talking about can we rent a truck, and the real problem [20] is where can they be stored in a secure condition because they are a room unto themselves.

THE COURT: Okay.

MR. ZENOBI: The other thing — and I thank the Government for their cooperation — the other thing is regarding the requests made under No. 6 as to production of witnesses.

I expect the Government to ask their witnesses whether they wish to be interviewed by the defense, and I expect an answer from the Government pursuant to this Court's ruling, especially the material witnesses.

As far as the witnesses that are just going to come in and talk about chain of custody, I am not interested in that, but I expect a good faith request made of witnesses as to whether they will talk to me or give me a deposition prior to trial.

Secondly, as far as the stipulations, I am doing my best of get those in order. I think most of them will be in order by trial, and probably will save us a lot of time.

That's it.

THE COURT: From the standpoint of the witnesses as far as interviews are concerned, what are you talking about by way of interviewing?

MR. ZENOBI: We had a practice before Judge Aronovitz that worked out pretty well in a protracted case

* * * * * * *

[2] THE COURT: United States of America versus Vincent Victor Roggio.

MS. HECK: For the United States, Your Honor, Assistant United States Attorney Caroline Heck, Assistant United States Attorney Sonia O'Donnell.

With me at counsel table is Special Agent James Cavanaugh of the FBI.

MR. ZENOBI: Gene Zenobi for Mr. Roggio.

THE COURT: Mr. Roggio is here and present?

MR. ZENOBI: Yes, sir.

THE COURT: Mr. Roggio, the Court is in receipt of your letter of February the 3rd, 1987. I have not, in fact, shown this letter to either your counsel or to counsel for the Government. I have, in fact, taken the matter up with them, and they are aware of the fact that the contents of the letter indicate your concern that, in fact, Mr. Zenobi has not adequately and properly prepared for the trial of this case.

Your parting statement with regard to the letter, the last paragraph therefor, is:

> "Therefore, I respectfully request the Court to review this matter and to invoke the proper procedure necessary for the Court to be satisfied that I am receiving adequate defense, thus to insure a fair trial and one

that is not likely to be repeated [3] because of this kind of error.

"Respectfully," and thereafter is contained your signature.

Are there any matters that you desire to call to the Court's attention that are not contained in the letter?

DEFENDANT ROGGIO: No, sir.

THE COURT: All right. The Court is of the view at this point in time, having observed with regard to this particular case more so than usual, since the Court has met with counsel on more than several occasions and is aware of the number and extent of the documentation from the standpoint of the Government and the amount of time that Mr. Zenobi has, in fact, devoted to this case thus far, that insofar as the matter is concerned, the Court is of the opinion that he has, in fact, devoted a considerable amount of time with regard to the preparation of this particular case.

The Court is of the view that from the standpoint of the preparation of the case, that there is voluminous documentation that was, in fact, seized from you or your businesses which, in fact, Mr. Zenobi has been over. How one goes about the preparation of a case of this nature is not necessarily in conformity with how one's client might perceive or view the manner in which such preparation takes place.

[4] The Court is very much unconvinced at this point in time that you have not received anything less than a full and complete and more than adequate preparation of your case which, very frankly, is not the criteria required under the Eleventh Circuit.

I am satisfied that, number one, Mr. Zenobi is an outstanding trial lawyer; and, number two, that he has devoted considerable time to the preparation of this case.

I am more than satisfied at this point that he has more than adequately represented you, regardless of how you perceive that situation.

My view of this does not obviously preclude at a subsequent time your calling to the Court's attention after we have in fact proceeded with the trial of this case, more specific assertions with regard to this matter if, in fact, you continue to have the same concerns that you have evidenced in this letter subsequent to the trial of this case.

But at this point, I am more than satisfied that Mr. Zenobi has done an excellent job in the preparation of this case, and I think that will be reflected by virtue of his representation of you.

So the Court is going to set the matter to rest at this point. I will, in fact, make your letter of February 3rd, 1987, a part of the record in this case and order that [5] the Clerk of the Court docket it so that it is made a part of the record in this case.

We are prepared to go forward with regard to jury selection in this matter —

MR. ZENOBI: Your Honor, the defendant has a statement.

THE COURT: Yes, sir.

DEFENDANT ROGGIO: Am I permitted to defend myself, Your Honor?

THE COURT: Sir?

DEFENDANT ROGGIO: Am I permitted to defend myself?

THE COURT: Are you permitted to —

DEFENDANT ROGGIO: Correct.

THE COURT: To what?

DEFENDANT ROGGIO: Defend myself.

THE COURT: If you, in fact, Mr. Roggio, make the determination, desire to make the determination of representing yourself, the Court will not preclude you from doing so, but will, in fact, require that Mr. Zenobi remain available to your for consulting and to observe and to do all of the things that the Court would have expected of him except that obviously nobody can compel you to, in fact, require that you accept the representations that the Court makes available to you.

[6] So the obvious answer to that is, if you desire to, in fact, represent yourself, the Court will make inquiry of you to make sure that you are alert, competent, intelligent, you fully understand the nature of your rights and the consequences of doing what you are suggesting you might do, to make sure it is done freely and voluntarily with the complete understanding that it is not coerced in any way, and if, in fact, you make that determination and the Court is satisfied that all of those things are true, you may, obviously, Mr. Roggio, proceed to represent yourself.

I will indicate, very frankly, and because I think to do otherwise, I think, very frankly, would keep the jury totally confused that, in fact, you made the decision to, in fact, represent yourself; that the Court has made available to you an individual who the Court feels and is satisfied is an expert with regard to representation of these matters, who will be available to you so that you can seek his counsel and assistance, and to explain, frankly, Mr. Zenobi's presence in the courtroom.

But you certainly may represent yourself.

DEFENDANT ROGGIO: Thank you, sir.

THE COURT: Is that your desire?

DEFENDANT ROGGIO: Yes, it is.

THE COURT: All right. Let me ask, if you will, [7] to step in front of the microphone, please.

Mr. Court Reporter, swear the defendant.

VINCENT VICTOR ROGGIO, DEFENDANT, SWORN.

THE COURT: Let the record reflect that the sole and only purpose for the Court inquiring of the defendant is to ascertain his awareness of the consequences of his decision, to satisfy the Court that he is alert, competent and intelligent, that he, in fact, is making the decision that he has announced to the Court freely and voluntarily.

And with that understanding, then, the Court will, in fact, proceed to allow the waiver to take place.

Mr. Roggio, your full name, please, sir?

DEFENDANT ROGGIO: Vincent Victor Roggio.

THE COURT: And how old are you, sir?

DEFENDANT ROGGIO: Forty-three.

THE COURT: How far did you go in school?

DEFENDANT ROGGIO: Two years of college.

THE COURT: What did you take up in those two years?

DEFENDANT ROGGIO: Business.

THE COURT: Where did you go to college?

DEFENDANT ROGGIO: Temple University.

THE COURT: How long ago was that?

DEFENDANT ROGGIO: I don't know — twenty years, approximately.

[8] THE COURT: What has been your primary occupation during your adult life?

DEFENDANT ROGGIO: Real estate investments.

THE COURT: Have you ever, in fact, during the course of your adult life been called upon to appear in court in which you actually represented yourself?

DEFENDANT ROGGIO: I have not, sir.

THE COURT: Have you, in fact, been present in a courtroom when cases are tried?

DEFENDANT ROGGIO: Not really, no.

THE COURT: So that you neither have civil nor criminal experience?

DEFENDANT ROGGIO: None whatsoever.

THE COURT: Have you, in fact, seen and been privy to the indictments in this case?

DEFENDANT ROGGIO: I have.

THE COURT: So that you understand what, in fact, you are charged with?

DEFENDANT ROGGIO: I do.

THE COURT: I assume that you are totally untrained in the law?

DEFENDANT ROGGIO: Correct.

THE COURT: And particularly in the area of what we would call the Rules of Evidence?

DEFENDANT ROGGIO: Correct.

[9] THE COURT: Have you ever been treated for any mental or emotional disability?

DEFENDANT ROGGIO: Never.

THE COURT: Are you presently taking any medication of any kind?

DEFENDANT ROGGIO: None whatsoever.

THE COURT: Are you presently under the influence of any narcotic or alcoholic beverage?

DEFENDANT ROGGIO: No, sir.

THE COURT: This decision on your part to represent yourself, has this been something which you have, in fact, discussed with either Mr. Zenobi or Mr. Hughes, who was your previous counsel, or any other lawyer?

DEFENDANT ROGGIO: Never.

THE COURT: Is the decision on your part a free and voluntary one?

DEFENDANT ROGGIO: As to the circumstances, yes.

THE COURT: From the standpoint of your decision, other than how you perceive the situation, are you, in fact, or have you, in fact, been threatened or coerced into this position, this decision?

DEFENDANT ROGGIO: Coerced? No. Put in the situation, yes.

THE COURT: From the standpoint of this decision, so that you understand, you are embarking upon what the

APPENDIX E

VINCENT ROGGIO
111 Willowbrook Road
Colts Neck, NJ 07722

February 3, 1987

Honorable Judge Eugene Spellman
301 North Miami Avenue, 7th Floor
Miami, FL 33128

Dear Judge Spellman,

I am writing you in regard to Eugene Zenobi, who is my court appointed attorney in the cases of the United States vs. Vincent Roggio (85-764cc-KING / 84-8069cr-SPELLMAN).

When Mr. Zenobi was appointed in approximately October of 1985, Mr. Alexander Hewes (my existing council at that time) and I went to see Mr. Zenobi in order to brief him as to the status of these cases and find out what was needed to prepare for my defense properly. Among many things, we informed Mr. Zenobi of the voluminous documentation housed in Mr. Hewes' office in Washington, D.C., indicating that naturally Mr. Zenobi would have complete access to these files and records in order to construct a proper defense for me as a defendant in these cases.

During the next 13 months, I telephoned Mr. Zenobi countless times yet my only communication was with his secretary, who advised me in August of 1986 that my trial would be held "sometime in early 1987". During the following few months I continued my efforts to reach Mr. Zenobi and, quite frankly, resorted to leaving urgent messages in regard to his disregard of these cases.

In early December 1986, I telephoned and finally spoke with Mr. Zenobi who advised me that my trial date had been set for February 2, 1987 and that I was to call again after the first of the year. When questioned about his preparedness for the trial, Mr. Zenobi responded, "Even you aren't that stupid". I am assuming that he was suggesting that I am so stupid as to believe that he wouldn't be properly prepared for these cases at the approximate time.

On January 5, 1987, I telephoned and spoke with Mr. Zenobi and was told to be in his office on January 9, 1987. This was then changed to January 12 because he wanted to attend the Evidentiary Hearing prior to the meeting with me.

I flew to Miami on January 12, and due to a flight delay, I arrived at 12:30 p.m. rather than at our prescheduled appointment time of 10:30 a.m. Due to my delay and another pending appointment which Mr. Zenobi had made, I had approximately 45 minutes in which to discuss these cases. During this discussion, I expressed grave concerns about Mr. Zenobi's preparations, or lack thereof, for my defense. I questioned him as to how a proper defense could be made without his ever investigating the documents and files in Mr. Hewes' possession,(of which according to Agent Cavanaugh there are over seventy thousand documents in this case), without ever speaking to any potential witnesses or without ever speaking to my previous co-defendants public defender. I was then informed by Mr. Zenobi that this is "a simple case"; his reasoning as related to me being because no evidence from other jurisdictions can be brought into this case and if so, I would be eligible for a new trial. He used an analogy: if you were accused of stealing a hammer from one hardware store, the prosecution is not allowed to incorporate any other stores you could potentially have stolen a hammer from. Upon closing our meeting, we agreed I would send a list of names of people to subpoena for the

trial; which I did. I then returned to New Jersey, hoping, yet somewhat doubtful, that Mr. Zenobi's approach would be a correct one.

On January 27, I telephoned and spoke with Mr. Zenobi and was informed of the fact that the trial had been postponed for one week. I then inquired as to when I should advise my potential witness to be available for testimony, infact at this point I am not sure they had ever been subpoenaed. Mr. Zenobi informed me that he had been told that the prosecution will take approximately 2 - 2-1/2 weeks to present their case. I again queried how this could be "a simple case". He then, for the first time, indicated that due to the Scheme Theory, the prosecution is able to enter evidence from other jurisdictions and then commented that this is a bad law, infact it "stinks". It appears to me a proper defense to these allegations in other jurisdictions and the allegations in these cases requires the use of documents and depositions which are located in Mr. Hewes' office which of course, to date, have never been seen by Mr. Zenobi.

The following morning I called Mr. Zenobi and left a message. He returned my call and in our conversation I related that I felt he was not in any way prepared for this trial (due to the numerous reasons previously stated). At that time, I was advised that if I didn't like the way my trial is being handled, to write you, Judge Spellman, a letter.

I fully realize that different attorneys prepare for different trials in different ways, however, I cannot conceive of an adequate defense to both my cases without, at least, some documentary research, communication with witnesses and perhaps most importantly, communication with me, the defendant. I do believe that with proper preparation my defense will result in my acquittal and vindication.

In summary, Mr. Zenobi, to my knowledge has spent:

- a total of two hours with Mr. Hewes
- a total of 2 hours and 45 minutes with me, in person and an approximate total of 1-1/2 - 2 hours in telephone conversations
- I have received no correspondence from him
- no time with potential witnesses
- no time researching records in either Washington, D.C. or Connecticut

Therefore, I respectfully request the court to review this matter and to invoke the proper procedure necessary for the court to be satisfied that I am receiving adequate defense; thus, to insure a fair trial and one that is not likely to be repeated because of this kind of error.

Respectfully,

/s/ Vincent Roggio
Mr. Vincent Roggio

VR/